Supreme Court, U.S.
FILED

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NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

FREDERICK DAVID STEINBERGER, III,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS HAS ESTABLISHED AN APPELLATE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE THAT FALLS BELOW THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

II. WHETHER THE PRESENT CRIMINAL CASE REVIEW OF SUFFICIENCY OF THE EVIDENCE IN TEXAS VIOLATES THE DUE PROCESS.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Frederick David Steinberger, III

Respondent, The State of Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review a final judgment of the Court of Criminal Appeals of Texas entered in this action on July 26, 2000.

OPINIONS BELOW

The conviction in the trial court is not reported.

The decision of the Court of Appeals is not reported.

The decision of the Court of Criminal Appeals of Texas is not reported.

All appellate decisions are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas was entered on July 26, 2000. This Court has jurisdiction to review the final judgment of the Court of Criminal Appeals of Texas pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called "Steinberger."

Respondent will be called "the State."

The facts in this case are:

This case involves a one vehicle accident that occurred at an unknown time on or about April 2, 1997.

The vehicle, a pickup truck, was described a badly damaged and had appeared to roll over at least twice.

At approximately 9 to 10 p.m. on April 2, 1997, Steinberger was discovered by James West inside the pickup truck, which was sitting in a field. The pickup truck was off the road by approximately two to two and one-half car lengths. Steinberger was not wearing a seat belt. He was slumped over in the cab of the truck with his posterior in the driver's seat and

his arms and shoulders on the floor of the passenger's seat. He appeared to Mr. West to be unconscious. The time of day that the accident was discovered was described as dark or nighttime. The diesel engine was running, but the headlights were not on.

Mr. West left to call for help. There was another person on the scene when he left to call for help. While Mr. West was gone, Steinberger exited the pickup truck through the driver's side window. After Steinberger exited the vehicle he informed persons at the scene that he had not been driving and asked about the whereabouts of the other person in the vehicle with him. A search of the immediate area was begun, but no other person was located to the knowledge of the persons who had stopped. Steinberger was removed from the scene by a cousin.

There were many empty liquor containers and bottles inside the cab of the truck and laying on the ground around the vehicle.

There were no known witnesses to the accident and no one testified to having observed Steinberger driving any vehicle on the day in question.

There was no evidence that Steinberger, who was in pain at the accident scene, had not consumed alcohol following the accident from the numerous liquor and alcohol containers found within the pickup truck cab.

It is undisputed that Steinberger suffered a head injury of unknown seriousness in the accident. Both the ambulance EMT and the treating hospital emergency room physician agreed that a head injury could have accounted for the combative, belligerent and aggressive conduct alleged to have been exhibited by Steinberger.

The State offered no breath, blood or urine tests into evidence. There was evidence that Steinberger refused to provide a requested blood test.

Steinberger left the hospital and was not arrested until several months later.

On appeal Steinberger maintained that the factual evidence was insufficient to prove the following necessary elements:

A. The time of the alleged offense; and/or

B. That Steinberger was intoxicated at the time of the alleged offense; and/or

C. That Steinberger was the driver at the time of the alleged offense.

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Steinberger was convicted of the Driving While Intoxicated – Repetition a third degree felony offense and a ten (10) year sentence was assessed together with a $2500.00 fine.

The Court of Appeals rendered its Opinion affirming the lower court on December 23, 1999.

The Court of Appeals overruled Steinberger's Motion for rehearing on February 3, 2000.

The Court of Criminal Appeals refused Steinberger's Petition for Discretionary Review on July 26, 2000.

(iii) WHEN AND WHERE PETITIONER RAISED FEDERAL QUESTIONS:

The Petitioner's complaints in this Petition for Writ of Certiorari are addressed solely to the matter of appellate review of the sufficiency of the evidence. As such these complaints were not ripe at the trial court level, were not required to be raised at the trial court level, and were not raised at the trial court level.

Following the first level of appellate review resulting in a written opinion, the Petitioner raised the denial of Due Process under the Fourteenth Amendment to the United States Constitution in relation to the sufficiency of the evidence review on appeal in his Motion for Rehearing addressed to the Court of Appeals. (A copy of Petitioner's Motion for Rehearing is set out verbatim at Appendix B)

Thereafter, the Petitioner raised the denial of Due Process under the Fourteenth Amendment to the United States Constitution in relation to the sufficiency of the evidence review on appeal in his Petition for Discretionary Review addressed to the Texas Court of Criminal Appeals. (A copy of the Petition for Discretionary Review is set out verbatim at Appendix D)

REASONS FOR GRANTING THE WRIT

I. In civil cases in Texas "when circumstances are consistent with either of . . . two facts and nothing shows that one is more probable than the other, neither fact may be inferred."[1] The application of this construct results in the Plaintiff not having met his burden of proof by a preponderance of the evidence.

II. Likewise, if the circumstantial proof at the trial of a criminal case equally supports guilt and equally supports innocence, the State should lose as a matter of law because the State has not proved guilt beyond a reasonable doubt.

III. In order for the defendant in a criminal case to prevail on a sufficiency review, the Texas

Court of Criminal Appeals is requiring that the circumstantial evidence clearly and firmly establish innocence in order for the conviction to be held manifestly unjust.

IV. **There are several problems with not assessing whether the circumstantial evidence equally supports either inference, one of which is that the defendant is in effect being required to prove something when the defendant has no burden to prove anything whatsoever.**

V. **The present system of sufficiency review in a situation where the circumstantial evidence equally supports either the inference of guilty or not guilty, is not being properly evaluated on appeal.**

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[1] *Litton Indus. Products v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984)

ARGUMENT AND AUTHORITIES

In the case of *Jackson v. Virginia*, 443 U.S.307, 61 LEd2d 560, 99 SCt 2781 (1979) this court held that the standard of review for a claim of insufficient evidence was proof of guilt beyond a reasonable doubt as determined by a rational trier of fact. While *Jackson v. Virginia* involved a federal habeas corpus proceeding, the holding has been applied to claims of insufficient evidence in criminal cases in general. *Cain v. State, infra.*

In the last paragraphs of the *Jackson* opinion this Court reflects that the prosecution does not have an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt. The Petitioner in this Writ is not arguing for such a review. The Petitioner's position is that the circumstantial evidence must point more strongly toward guilt and that the present review as it is conducted in Texas fails to properly consider whether the circumstantial evidence equally

supports an inference consistent with innocence thereby making the evidence insufficient to support a finding of guilt.

The Texas Court of Criminal Appeals describes a factual sufficiency review as requiring that the Court of Appeals must review all of the evidence. In *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997) the Texas Court of Criminal Appeals stated:

> "We explained that when a court of appeals reverses a lower court decision on factual sufficiency grounds, it should 'detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient . . . as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state **in what regard the contrary evidence greatly outweighs the evidence in support of the verdict**.' *Clewis*, 922 S.W2d at 135, citing *Pool*, 715 S.W.2d at 635 (as quoted in *Meraz*, 785 S.W.2d at 154 n. 2) (emphasis ours)

It is apparent from this explanation of the factual sufficiency review in Texas that the reviewing court is not

evaluating whether the circumstantial evidence equally supports guilt and equally supports innocence. When the circumstantial evidence supporting an element of the crime to be proved is only equal or less in support of the State's case, the State has failed to meet its burden under the Due Process clause of the Fourteenth Amendment to the United States Constitution. The present system of factual sufficiency review does not provide a method of review wherein such insufficient evidence can be identified and held to be insufficient.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-98-349-CR

FREDRICK DAVID STEINBERGER, III APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 97th DISTRICT COURT
OF ARCHER COUNTY

OPINION

INTRODUCTION

A jury convicted Appellant Fredrick David Steinberger, III of felony driving while intoxicated (DWI) and assessed punishment at ten years' confinement and a $2,500 fine. In a sole issue on appeal, Appellant argues that the evidence is both legally and factually insufficient to support the jury's verdict because the State failed to prove: (1) the time of the offense, (2)

that Appellant was intoxicated at the time of the offense, and (3) that Appellant was the driver at the time of the offense. Because we hold that the evidence is both legally and factually sufficient to support Appellant's conviction, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of April 2, 1997, James West was traveling northbound on Highway 281 toward Wichita Falls when he came upon a one-vehicle accident. West testified that the vehicle "was on the right-hand side of the road up to the fence" and that the vehicle's engine was still running. When West reached into the vehicle and turned off the ignition, he found a man who appeared to be unconscious in the driver's seat. The man's legs were under the steering wheel and he was slumped over to the right side of the vehicle. No one else was in the vehicle. West determined that the man was alive and left the scene to call 911. When West returned to the scene fifteen

minutes later, the man in the vehicle had disappeared.

Melanie McFadden arrived on the scene between 9:30 and 10:00 p.m. She observed a truck that had gone off the road and was up against a fence on the grass beyond the shoulder of the road. McFadden saw a man, whom she identified as Appellant, climbing out of the driver's side window. She spoke with Appellant, and he said that he was fine, that the truck was not his, and that he was not driving. McFadden testified that she saw a Crown Royal bottle near the truck, that she detected an odor of alcohol on Appellant, and that his speech was slurred. She watched as another man arrived on the scene. Appellant got into the other man's car and quickly fled from the scene.

Amanda Manzel saw the wrecked truck in the ditch and concluded that it had rolled over. She saw Appellant trying to climb out of the driver's side window of the truck. She testified that there was an empty cooler, beer cans, and liquor bottles around the truck and that the inside of the truck smelled of alcohol. Because Appellant stated that he had not

been driving the truck, Manzel and others on the scene searched for another individual, but they never found anyone else. Soon another car arrived on the scene, and Appellant ran over to the car and told the man in the car, "I've got to get out of here, I've got to get out of here, Let's go." Appellant then got in the car and left the scene.

Jeremy Vieth, Appellant's cousin, saw the accident scene as he was driving home from work. He recognized the wrecked truck as belonging to Appellant. Appellant was unconscious and sitting in the driver's seat, and Vieth had to yell at him to arouse him. Vieth drove Appellant from the scene and, although he believed Appellant needed medical attention, took Appellant to Appellant's brother's house and then to Appellant's mother's house. Vieth testified that he believed that Appellant was either very drunk or high and that when Vieth got to the wrecked truck, he could smell alcohol.

DPS Trooper Mark Elgin arrived on the scene and observed that the truck was inside a barbed-wire fence. Elgin

saw a debris path of beer cans, liquor bottles, and pickup parts. Based on his training and experience, Elgin concluded that Appellant was northbound on Highway 281 when the truck ran off the road to the left, started skidding, ran into the left borrow ditch, slid sideways to the right back across the highway, hit the right borrow ditch, and overturned.

DPS Trooper Daniel Crayton received a call about a possibly fatal accident on Highway 281 and responded to the accident. En route he heard on the radio that the driver had left the scene but had been located. Crayton arrived at the location where the driver had been found and identified the man as Appellant. Crayton testified that he detected a strong odor of an alcoholic beverage coming from Appellant's breath and on his person. Crayton then went to the accident scene. Crayton saw a lot of alcohol bottles inside and around the truck. He determined that the wrecked truck was registered to Appellant. Crayton located a billfold in the driver's seat containing Appellant's driver's license and

insurance card but did not find a billfold or any other personal effects belonging to any other person in the truck. Crayton then went to the hospital where Appellant was being treated. Crayton testified that Appellant was, "boisterous, cursing, belligerent, and not real cooperative" and that there was still an odor of an alcoholic beverage about Appellant's person. Crayton also testified that, in his opinion, Appellant was intoxicated. No evidence of either breath or blood alcohol concentration, however was admitted at trial.

STANDARDS OF REVIEW

Standard of Review-Legal Sufficiency

In reviewing the legal sufficiency of the evidence to support a conviction, we view the evidence in the light most favorable to the verdict.[1] The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found

[1] *See Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993).

the essential elements of the crime beyond a reasonable doubt.[2] This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.[3]

The legal sufficiency of the evidence is a question of law. The issue on appeal is not whether we as a court believe the State's evidence or believe that the defense's evidence outweighs the State's evidence.[4] Our duty is not to reweigh the evidence from reading a cold record but to act as a due process safeguard ensuring only the rationality of the fact finder.[5] The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt.[6] The standard for review is the same

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[2] *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App.), *cert. denied*, 118 S.Ct. 125 (1997).
[3] *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979).
[4] *See Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991); *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App.), *cert denied*, 469 U.S. 892 (1984).
[5] *See Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996).
[6] *See Matson*, 819 S.W.2d at 846.

for direct and circumstantial evidence cases.[7]

Standard of Review—Factual Sufficiency

This court has the authority to review fact questions in criminal cases.[8] In reviewing the factual sufficiency of the evidence to support a conviction, we are to view "all the evidence without the prism of in the light most favorable to the prosecution."[9] We may only set aside the verdict if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.[10] In performing this review, we are to give "appropriate deference" to the fact finder.[11] We may not reverse the fact finder's decision simply because we may disagree with the result.[12] Instead, we may find the evidence factually insufficient only where necessary to prevent manifest injustice.[13] A factual sufficiency review of circumstantial evidence is the

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[7] *See Geesa v. State*, 820 S.W.2d 154, 158-62 (Tex. Crim. App. 1991).
[8] *See Clewis v. State*, 922 S.W.2d 126, 129-30 (Tex. Crim. App. 1996).
[9] *Id.* at 129 (citing *Stone v. State*, 823 S.W.2d 375, 381 (Tex.App.—Austin 1992, pet ref'd, untimely filed)).
[10] *See id.*
[11] *Id.* at 136.
[12] *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

same as a review of direct evidence.[14]

DISCUSSION

To sustain the conviction for DWI, the State must prove that Appellant (1) was intoxicated (2) while operating a motor vehicle (3) in a public place.[15] The issues, therefore, are whether Appellant was the operator of the truck and whether, at the time he operated the truck, he did not have the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body.[16]

A threshold inquiry is whether the State must prove that Appellant was driving the truck in order to prove that he was operating the truck. We hold that the State does not. Although the DWI statute does not define the term "operating," Texas courts have held that the plain meaning of the word requires

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[13] *See id.*

[14] *See Desselles v. State*, 934 S.W.2d 874, 878 (Tex.App.—Waco 1996, no pet.).

[15] *See* TEX. PENAL CODE ANN. § 49.04(a) (Vernon Supp. 2000).

[16] *See id.* § 49.01(2)(A) (definition of "intoxicated").

"effort, the doing of something, by the operator."[17] We must examine the totality of the circumstances to determine whether Appellant exerted persona effort upon the truck in a manner that shows intentional use of the truck for it intended purpose.[18]

Evidence of Appellant's actual driving of the vehicle is not required to prove his operation of the vehicle. For example, our sister courts of appeal have held that there is sufficient evidence to prove operation when the defendant was sitting in a parked car with his foot on the brake, the engine running, and the car in gear;[19] when the defendant was slumped behind the steering wheel with his foot depressing the brake pedal and holding the car in place, the car's transmission was turning in drive, and the engine was running;[20] and when the defendant was asleep at the wheel of a car with a flat tire, the headlights on, the

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[17] *Reddie v. State*, 736 S.W.2d 923, 926 (Tex.App.—San Antonio 1987, pet. ref'd); *see also Barton v. State*, 882 S.W.2d 456, 459 (Tex. App.—Dallas 1994, no pet.).

[18] *See Barton*, 882 S.W.2d at 459.

[19] *See Milam v. State*, 976 S.W.2d 788, 789 (Tex.App.—Houston [1st Dist.] 1998, pet. filed).

engine running, and the gearshift in drive.[21]

In the case now before us, however, there is no evidence that Appellant operated the truck after West arrived at the scene. There is no testimony that Appellant's foot was on the brake, that the truck was in gear, or that Appellant in any way exerted personal effort upon the truck. We cannot conclude that Appellant's sitting unconscious in the driver's seat, in and of itself, constitutes operation of the truck, even though the engine was running.[22] Appellant argues that to prove he was operating the vehicle while intoxicated, there must be direct evidence that he was intoxicated when he was driving on the roadway. He asserts that evidence that he might have been intoxicated when he was discovered at the

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[20] *See Ray v. State*, 816 S.W.2d 97, 98 (Tex.App—Dallas 1991, no pet.).

[21] *See Garza v. State*, 846 S.W.2d 936, 936 (Tex.App.—Houston [1st Dist.] 1993, pet. ref'd).

[22] *See Ballard v. State*, 757 S.W.2d 389, 391 (Tex.App.—Houston [1st Dist.] 1988, pet. ref'd) (holding that testimony that appellant was seated unconscious in driver's seat of motor vehicle parked on shoulder of highway with engine running did not establish that appellant was operating motor vehicle).

accident scene is insufficient to support his conviction because there is no temporal connection between the intoxication and the driving.

The State agrees that, under the specific facts of this case, proof that Appellant operated the truck while intoxicated requires proof that he was intoxicated when he was actually driving the vehicle. The State relies on circumstantial evidence to prove that Appellant was the driver of the truck and that he was intoxicated at the time he was driving. The essence of a verdict based on circumstantial evidence is that the party bearing the burden of proof has presented sufficient evidence from which the trier of fact could find or infer each and every element of the offense beyond a reasonable doubt.[23]

In the case before us, the jury received evidence that:

- Appellant was alone and unconscious in the

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[23] *See generallyManrique v. State*, 994 S.W.2d 640, 650 (Tex. Crim. App. 1999) (holding that based on circumstantial evidence jury could reasonably infer appellant's culpable mental state).

driver's seat of the truck

- the truck was registered to Appellant
- Appellant's billfold containing his driver's license and insurance card was found in the truck
- the truck's engine was still running
- at least four vehicles arrived at the scene of the wreck within an approximately fifteen-minute period, thus indicating that the road was moderately well traveled
- no one reported seeing the wrecked truck before James West arrived at the scene
- witnesses saw empty beer cans and liquor bottles in and around the truck
- Trooper Elgin concluded that the truck ran off the road to the left, started skidding, ran into the left borrow ditch, slid sideways to the right back across the highway, hit the right borrow

ditch, and overturned

- Appellant's speech was slurred
- Appellant's cousin and Trooper Crayton both spoke with Appellant and determined that he was intoxicated
- Appellant fled from the accident scene, thus constituting evidence of his consciousness of guilt.[24]

We conclude that these facts taken together are sufficient for the jury to find or infer that Appellant was driving the truck a short time before he was discovered, that he had ingested sufficient alcohol before the wreck to deprive him of the normal use of his mental or physical faculties, and that he was unconscious as a result of the wreck and unlikely to have ingested alcohol between the time of the wreck and James West's discovery of the truck.

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[24] *See Bigby v. State*, 892 S.W.2d 864, 884 (Tex. Crim. App. 1994), *cert. denied*, 515 U.S. 1162 (1995).

Viewing the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found the essential elements of DWI beyond a reasonable doubt. And viewing all the evidence without the prism of in the light most favorable to the prosecution, we hold that the verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We therefore hold that the evidence is legally and factually sufficient to support Appellant's conviction for DWI. We overrule Appellant's sole issue on appeal and affirm the trial court's judgment.

PANEL A: CAYCE, C.J.; DAY and DAUPHINOT, JJ.
CAYCE, C.J. concurs without opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.3(a)

DEC 23 1999

APPENDIX B

No. 2-98-349-CR

FREDRICK DAVID STEINBERGER, III	§
	§
VS.	§
	§
THE STATE OF TEXAS	§

MOTION FOR REHEARING

TO THE HONORABLE PANEL OF JUDGES OF THE COURT OF APPEALS:

NOW COMES the Appellant and files this his Motion for Rehearing in this case and would show the court the following:

1. The Court of Appeals erred by failing to following the requirements of *Clewis v. State*, 922 S.W. 2d 126 (Tex. Crim. App. 1996) and *Cain v. State*, 958 S.W. 2d 404 (Tex. Crim. App. 1997) which require that the court actually consider and review all of the evidence in a factual insufficiency ground on appeal. The court is not free to exclude evidence that goes against the verdict of the jury and provides evidence of explanations not compatible with the verdict and undermines the verdict as one which reasonable people could reach beyond a reasonable doubt.

In this case, while the Opinion states that all the evidence has been reviewed, wholesale witnesses called by the state who gave evidence of alternative reasonable hypothesis inconsistent with guilt of the Appellant, have been wholly omitted. Significantly omitted are Mr. Rojas the ambulance driver who testified relative to head injuries and Dr. Ruiz, a licensed treating physician, who testified as to head injuries and the fact that all of

the conduct of Defendant could be explained by a head injury. The concept of negating alternative reasonable hypothesis is directly applicable to the area of factual review for the reason that the court must conclude from **ALL** of the evidence that the verdict is not contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The burden is on the state, beyond a reasonable doubt, to present factual evidence to establish each element in the case. In the court's opinion the court has attempted to point to some evidence and then use inference to leap the gaps. However there must be at least some factual evidence, whether direct or circumstantial, to support each element. In this case there is absolutely zero evidence to establish that the defendant consumed alcohol before the wreck occurred. The court omits the devastating and uncontradicted testimony of multiple witnesses, including Trooper Elgin, that the wreck could have easily occurred hours before it was discovered, that there is just no way of telling. Consequently any determination that Appellant was drinking before the accident occurred is not based upon inference but rank speculation without support in the evidence of this case. When the time that Appellant was allegedly driving cannot begin to be establish in the concept of hours, then the entire case falls.

Both the Constitution of Texas and the Constitution of the United States provide for a burden of proof beyond a reasonable doubt. Burden of proof is grounded in both constitutions and failure to apply the appropriate burden is a violation of both constitutions. A conviction for a criminal offense, where the facts support explanations that are incompatible with guilt of the defendant, may not constitutionally be sustained by choosing to ignore the facts and explanations that as a matter of law rise to the level of reasonable doubt because the other reasonable explanations negate the guilt of the accused. In this case the state's proof has not excluded other

reasonable explanations, supported by the evidence, that the Defendant is not guilty.

The facts in this case could not even meet a preponderance of the evidence review, let alone a beyond a reasonable doubt review.

Additional specific grounds on which this motion relies are:

2. This court has erred by failing to consider all of the evidence in its factual sufficiency review, and consequently the Appellant has been deprived of Due Process of Law pursuant to the Fourteenth Amendment to the United States Constitution.

3. This court has erred by failing to hold the State to its burden of proof beyond a reasonable doubt, and consequently the Appellant has been deprived of Due Process of Law under the Fourteenth Amendment to the United States Constitution.

4. This court has erred by failing to hold the State to its burden of beyond a reasonable doubt, and consequently the Appellant has been deprived of Equal Protection of the Law in violation of the Fourteenth Amendment to the United States Constitution.

5. This court has erred by failing to considered all of the evidence in its factual sufficiency review, and consequently the Appellant has been deprived of Due Process of Law pursuant to Art. 1 § 19 of the Texas Constitution.

6. The court has erred by failing to hold the State to its burden of proof beyond a reasonable doubt, thereby depriving appellant of Due Process of Law pursuant to Art. 1 § 19 of the Texas Constitution.

7. This court has erred by failing to hold the State to its burden of proof beyond a reasonable doubt, thereby depriving Appellant of Equal Protection of the Law in violation of Art. 1 § 19 of the Texas Constitution.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the court grant this motion for rehearing, withdraw its original opinion, review the entirety of the evidence pursuant to a burden beyond a reasonable doubt and reverse and render this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was mailed to Tim Cole, District Attorney, P.O. Box 55, Montague, Texas 76301 on this 7th day of January, 2000.

Holly Crampton

APPENDIX C

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-98-349-CR

FREDRICK DAVID STEINBERGER, III APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 97th DISTRICT COURT
OF ARCHER COUNTY

ORDER

We have considered appellant's "Motion For Rehearing."

It is the opinion of the court that the rehearing should be and is hereby denied and that the opinion and judgment of December 23, 1 999 stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

SIGNED February 3, 2000.
PANEL A: CAYCE, C.J.; DAY and DAUPHINOT, JJ.

APPENDIX D

IN THE
COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AT AUSTIN

FREDRICK DAVID STEINBERGER, III,	§	
	§	
Petitioner	§	
	§	
VS.	§	NO. _____
	§	
THE STATE OF TEXAS,	§	
	§	
Respondent	§	

* * * * * * * *

PETITION OF FREDRICK DAVID STEINBERGER, III
FOR DISCRETIONARY REVIEW
UNDER RULE 68 T.R.A.P.

* * * * * * *

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that oral argument would be helpful in the event this Petition is granted for the reasons that 1) the question of revisiting the constitutional validity of the present sufficiency of the evidence review is a significant question of fact

and law and 2) the matter of the facts and a comparison of the facts that supported the verdict versus the facts that do not support the verdict would benefit from oral argument.

STATEMENT OF THE CASE

Petitioner was convicted of the offense of Driving While Intoxicated Repetition with punishment assessed at ten years confinement in the Texas Department of Criminal Justice – Institutional Division.

The facts of the case are not correctly summarized in the opinion of the Court of Appeals because the Court of Appeals has omitted significant relevant evidence. The testimony of the ambulance driver and the testimony of the treating physician, both called by the state, is wholly omitted in the Court of Appeals Opinion as is the testimony of the Defendant's mother, a defense witness.

The relevant evidence omitted is the following:

1. The Defendant suffered a head injury, but its severity was unknown. (RR Vol. 3 pages 46-47

& 50)

2. Both the treating physician and the EMT testified that the conduct (combative, belligerent, aggressive, etc.) of the Defendant could be explained by a head injury. (RR Vol. 2 page 177 ll. 2-15 & Vol. 3 page 47 ll. 11-16)
3. There is evidence that the Defendant was unconscious when found in the vehicle by James West and his cousin, Jeremy Vieth. (RR Vol. 2 page 79 ll. 17-23; Vol. 2 page 120 ll. 3-9)
4. The ambulance driver, an EMT, testified that a loss of consciousness can sometimes result in a person acting in a combative and unpleasant manner, such as he observed Defendant to act. (RR Vol. 2 page 177 ll. 2-15)
5. There is no evidence in the record of how long Defendant was unconscious or if he came in and out

of consciousness following the accident but prior to his discovery.

6. There is no known witness to having seen the defendant driving. (RR. Vol. 2 page 44 ll. 14-22)
7. There is no known witness to the accident. (RR Vol. 2 page 97 ll. 15-22 and Vol. 2 page 44 ll. 4-22)
8. There is no telling whether the accident happened hours or minutes before its discovery. (RR Vol. 1 page 114 ll. 14-22; Vol. 2 page 44 ll. 14-22; Vol. 2 page 116 ll. 11-18)
9. DPS Trooper Elgin testified that nobody really knows when the accident happened. (RR Vol. 2 page 44 ll. 17-19)
10. The Defendant was found when it was late, dark or nighttime. (RR Vol. 2 page 83 line 5 and page 90 ll. 7-11)

11. The vehicle's headlights were not on. (RR Vol. 1, page 104 ll. 14-25 & page 105 ll. 1-3; Vol. 2 page 79 ll. 2-8)

12. The Defendant's wallet was with him at the hospital where he was transported at the direction of DPS Trooper Crayton that evening. (State's Exhibit No. 4, Defendant's hospital records, which reflect the Defendant's property that he entered the hospital with and that the hospital had in safekeeping.)

13. The inside of the vehicle smelled or "reeked" of alcohol. (RR Vol. 2 page 48 ll. 3-5 and page 102 ll. 9-11 and page 150 ll. 17-25)

14. The person of Defendant smelled of alchol. (RR Vol. 2 p. 149 ll. 7-9)

15. There were empty (not broken) alcohol containers found inside the cab of the car. (RR Vol. 2 page 48 l. 6-11 and apge 150 ll. 17-25)

16. There was no evidence presented as to when the Defendant consumed alcohol, before the accident, or after the accident.

17. A single beer can cause significant odor of alcohol on the breath. (RR Vol. 2 page 178 ll. 5-9)

18. The Defendant did not stagger after climbing out of the vehicle window. (RR Vol. 1 page 114 ll. 7-10)

19. The Defendant exited the vehicle through the driver's window shortly after being awakened by his cousin. (RR Vol. 1 page 97 ll. 23-25 and page 98 ll. 1-2)

20. The Defendant had blood on his head from a head injury. (RR Vol. 1 page 102 l. 21 and page 105 ll. 17-19; Vol. 2 page 99 line 19 and page 178 ll. 21-23)

21. The vehicle had rolled at least twice was in an upright position on all four wheels. (RR Vol. 2 page

31 ll. 10-19 and page 50 ll. 17-18 and page 51 ll. 4-5)

22. DPS Trooper Crayton arrived on the scene from Young County, where he had been investigating a car/cow accident. (RR Vol. 2 page 146 ll. 4-6)

23. The evidence involving the path that the vehicle had taken, as testified to by Trooper Elgin, was consistent with a driver avoiding a cow or something on the road. (RR Vol. 2 page 44 ll. 2-5)

24. From the distance that the vehicle traveled and the marks that Trooper Elgin saw, he determined that the vehicle was not traveling real fast. (RR Vol.2 page 44 ll. 6-13)

25. When asked if the road in question was heavily traveled, DPS Trooper Crayton testified that at the time of night "there might be little traffic at that time." (RR Vol. 2 page 147 ll. 7-17)

26. The rural area where Defendant was driving has animals on the roadway at times. (RR Vol. 2 page 86 ll. 21-25 and page 87 ll. 1-5)

27. There was no evidence that Defendant was wearing a seat belt when he was found.

28. DPS Trooper Elgin could not exclude the fact that other persons could have been in the vehicle at the time of the accident. (RR Vol. 2 page 57 ll. 17-25 and page 58 ll. 1-16)

29. There was no medical evidence of steering wheel impact on the Petitioner's body. (State's Exhibit No. 4 Petitioner's hospital medical records)

30. Petitioner's cousin Jeremy Vieth testified that when he arrived at the accident scene that he recognized his great uncle's (Petitioner's father) truck. (RR Vol. 2 page 107 ll. 2-21 and page 114 ll. 13-16)

31. Vieth testified that he tried to help the Petitioner out of the window of the truck, that he and the Petitioner

had a short conversation, that the Petitioner sat down briefly and that after this Vieth and the Petitioner left the scene in Vieth's vehicle, but that he did not speed away. (RR Vol. 2 pages 139 ll. 16-25 and 140 ll. 1-4)

32. Vieth testified that of his own knowledge he did not know whether the Defendant was drunk or was just injured from the wreck. (RR Vol. 2 page 115 ll. 23-25)

33. The Petitioner's mother, in her capacity as Executrix of the Estate of Frederick David Steinberger, II, had transferred the vehicle into her sons' name only a few weeks before the accident and had not told the Petitioner of doing this. (RR Vol. 3 page 53)

34. Although DPS Trooper Crayton spent several hours at the hospital with the Defendant following the Defendant's transport that evening following the

accident, the Defendant was not arrested, but was released to go home from the hospital.

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE

The Court of Appeals opinion was entered on December 23, 1999, affirming the jury verdict in this case.

Thereafter on January 7, 2000, a Motion for Rehearing was forwarded by mail to the Court of Appeals and stamped as received by the Court of Appeals on January 10, 2000.

On February 3, 2000, the Court of Appeals denied the Motion for Rehearing.

On March 10, 2000, the Court of Criminal Appeals granted an extension of time to file Appellant's Petition for Discretionary Review to March 13, 2000.

GROUNDS FOR REVIEW

Ground No. One: The Court of Appeals failed to follow this Court's legal standard for determining the factual sufficiency of the elements of the offense by failing to compare the evidence

that supports the existence of the elemental fact in dispute with the evidence that tends to disprove that fact.

Ground No. Two: The Court of Appeals failed to consider all of the evidence in its factual sufficiency review.

Ground No. Three: The facts set out as relied upon by the Court of Appeals will not support "inferences" legally sufficient to establish the disputed elements.

Ground No. Four: The "facts" and "inferences" upon which the Court of Appeals relies to establish that the accident happened shortly before the Defendant was discovered and that the Petitioner had been drinking before the accident and not after it are in actuality mere speculation and are not supported by the evidence or reasonable inferences.

Ground No. Five: In the matter of review of factual and legal sufficiency of the evidence, this Court erred by discarding the alternate hypothesis of guilt construct and/or the hypothesis of innocence concepts because the Petitioner is then deprived of the general rule of civil law, under the preponderance of

evidence burden: that "when circumstances are consistent with either of two facts and nothing shows that one is more probable than the other, neither fact may be inferred," thereby permitting a conviction under even less than a preponderance of the evidence burden in violation of the Petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Ground No. Six: This case conflicts with the cases of *Johnson v. State*, 517 S.W.2d 536 (Tex. Crim. App. 1975) and/or *Sinast v. State*, 688 S.W.2d 631 (Tex.App.—Corpus Christi 1985 no pet.)

Ground No. Seven: By failing to require the State to meet its factual and/or legal proof of the elements beyond a reasonable doubt, Petitioner was denied equal protection of the laws under Article I, Section 19 of the Texas Constitution.

Ground No. Eight: By failing to require the State to meet its factual and/or legal proof of the elements beyond a reasonable doubt, Petitioner was denied equal protection of the laws under

the Fifth and Fourteen Amendments to the United States Constitution.

REASONS FOR REVIEW

1. The Court of Appeals failed to consider all of the evidence in its factual sufficiency review in violation of this Court's opinions in *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997), *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996) and *Johnson v. State*, _____ S.W.2d _____ (Tex. Crim. App. No. 1915-98 delivered February 9, 2000)

2. In order to determine whether the verdict is manifestly unjust, the Court of Appeals failed to compare all of the relevant evidence that supports the verdict against all of the relevant evidence which does not support the verdict in violation of *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)

As stated in the recent case of *Johnson, supra*, "...in the context of a factual sufficiency review, the evidence, considered as a whole, may arguably not rise to the level of satisfying the State's burden of establishing beyond a reasonable doubt that

appellant was the perpetrator. To make this determination, a complete and detailed examination of all the relevant evidence is required. ..."

3. The decision in this case conflicts with the case of *Johnson v. State*, 517 S.W.2d 536 (Tex. Crim. App. 1975).

4. The decision in this case conflicts with the case of *Sinast v. State*, 688 S.W.2d 631 (Tex.App.—Corpus Christi, 1985 no pet.).

5. The application of the present review of sufficiency of factual evidence is constitutionally defective when a review is conducted as the Court of Appeals did in this case. The fallacy is that the Appeals Court is permitting facts and circumstances that are consistent with either the guilt or the innocence of the defendant to be used to infer guilt even though nothing shows that the inference that supports guilt is more probable than the inference that supports innocence. This court should re-examine the issue and provide guidance and clarity to the lower courts in fact situations of this nature in order to

preclude a result of manifest injustice and an unconstitutional conviction of the Petitioner.

PRAYER FOR RELIEF

That the Judgment of the trial court and the Opinion of the Court of Appeals be reversed and rendered.

APPENDIX

A copy of the opinion of the Court of Appeals is attached to this Petition as APPENDIX A. A copy of the Order denying Motion for Rehearing in the court of Appeals dated February 3, 2000 is attached as APPENDIX B. A copy of the Order granting an extension of time to file Appellant's Petition for Discretionary Review is attached as APPENDIX C.

Respectfully submitted,

LAW OFFICE OF HOLLY CRAMPTON
505 Lamar Ave.
Wichita Falls, Texas 76301
Telephone: 940-723-8500
Fax phone: 940-322-1900

By:_____
Holly Crampton
State Bar No. 05004500

Attorney for Petitioner,
Fredrick David Steinberger

CERTIFICATE OF SERVICE

A true copy of the above Petition of Fredrick David Steinberger for Discretionary Review has been mailed, certified, return-receipt requested, to each of the following:

John Brasher
Assistant District Attorney
Wichita Co. Courthouse
Wichita Falls, Texas 76301

State Prosecuting Attorney
P.O. Box 12405
Austin, Texas 78711

Dated: March 28, 2000.

_____
Holly Crampton

APPENDIX E

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

July 26, 2000
COA#: 02-98-00349-CR
RE: Case No. 0821-00
STYLE: STEINBERGER, FREDRICK DAVID, III

On this day, the Appellant's Petition for Discretionary Review has been refused.